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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ORLANDO TERREL SMITH, Defendant and Appellant.	B189383 (Los Angeles County Super. Ct. No. MA033362)

APPEAL from a judgment of the Superior Court of Los Angeles County, Carol S. Koppel, Judge. Affirmed.

Bruce G. Finebaum, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and David D. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II and III of the Discussion.

Appellant Orlando Terrel Smith argues the trial court improperly imposed a deadly weapon use enhancement (Penal Code section 12022, subdivision (b)(1))[1] because he used the weapon (a knife) to kill a dog rather than a human being, and because, he claims, use of the knife is an element of the crime of animal cruelty (section 597, subdivision (a)) as charged. In the published portion of this opinion, we reject both arguments.[2] In the unpublished portion of the opinion, we consider appellant's contentions that the court erred in allowing a police officer to testify to statements that were not disclosed to appellant until the morning of testimony, and by not instructing the jury on the People's alleged violation of a reciprocal discovery rule; and his claim of cumulative prejudice. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

Appellant and Latisha Bell dated for about a year. During that time, appellant gave Bell's daughter a puppy named Raven. Appellant had a bad temper. He knew Bell and her daughter loved Raven, and, on occasion, would threaten to kill Raven when he was angry with Bell.

In early October 2005, Bell ended the relationship. Shortly thereafter, on October 7, 2005, appellant called Bell several times. He was angry, and told Bell that bad things were going to start happening to her. He warned that because she had caused him pain, he was going to cause her pain. While on the phone with appellant, Bell heard his voice coming from her backyard. After seeing someone walk past her daughter's window, Bell called 911.

After calling 911, Bell heard Raven "screeching." When she looked outside, she saw Raven bleeding. Officers arrived at Bell's house, and appellant continued to call

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[1] All further statutory references are to the Penal Code.

[2] Certified for publication are the initial paragraph, the Factual and Procedural Summary, part I of the Discussion and the Disposition.

Bell. During one conversation, Bell asked appellant why he killed Raven. He told her that he had warned bad things were going to happen to her, and this was only the beginning. When Bell posed the question to him again, appellant denied killing Raven and asked Bell how she knew he did not send someone else to kill the dog.

Appellant continued to call Bell that evening. Steven Harbeson, one of the officers who arrived at Bell's house, answered several of those calls. When Harbeson asked appellant if he killed Raven, appellant would not admit or deny it. Appellant then asked Harbeson if he could be arrested for killing his own dog. Harbeson told appellant, untruthfully, that a neighbor had seen appellant kill Raven. Appellant then hung up. When appellant called back, Harbeson told him that the neighbor saw him hop over a wall. Appellant told Harbeson that he now knew Harbeson was lying because he did not hop over a wall.

When animal control officers arrived they found Raven dead, with a metal knife blade sticking out of her back. Appellant was arrested and denied killing Raven. He claimed he was at his aunt's house that evening, which she corroborated.

Appellant was charged with making criminal threats, in violation of Penal Code section 422 (count 1), and felony cruelty to an animal, in violation of section 597, subdivision (a) (count 2). It was alleged that he used a deadly weapon, within the meaning of section 12022, subdivision (b)(1), in the commission of count 2. A jury acquitted him of count 1, found him guilty of count 2 and found the deadly weapon allegation true. Appellant was sentenced to the low term of 16 months on count 2, and the one-year deadly weapon use enhancement was stayed. He filed a timely notice of appeal.

DISCUSSION

I

Appellant argues that imposition of the deadly weapon use enhancement of section 12022, subdivision (b)(1), was improper for two reasons: (1) it does not apply when the

weapon is used against an animal, and (2) use of a deadly weapon is an element of the crime of animal cruelty as charged.

Section 12022, subdivision (b)(1) states: "Any person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense."

Appellant contends this enhancement can only be imposed when the deadly or dangerous weapon is used against a human being because in *People v. Wims* (1995) 10 Cal.4th 293, 302 (*Wims*)[3], the Supreme Court stated, "[i]n order to find 'true' a section 12022(b) allegation, a fact finder must conclude that, during the crime or attempted crime, the defendant himself or herself intentionally displayed in a menacing manner or struck someone with an instrument capable of inflicting great bodily injury or death." Appellant argues the term "someone" can only refer to a human being.

Wims observed that the jury instruction for section 12022, subdivision (b) is adapted from the language of section 1203.06, which prohibits probation where a firearm is used in the commission of certain crimes. (*Wims, supra,* 10 Cal.4th at p. 302.) Section 1203.06, subdivision (b)(2) states: "As used in subdivision (a), 'used a firearm' means to display a firearm in a menacing manner, to intentionally fire it, [or] to intentionally strike or hit a human being with it . . . ." Appellant interprets this language to mean that a firearm is "used" only when the victim is a human being. Because the jury instruction for section 12022, subdivision (b) was adapted from section 1203.06, appellant argues that section 12022, subdivision (b)(1) should be interpreted to apply only when a deadly or dangerous weapon is used against a human being. He points out that section 12022, subdivision (b) was added to the Penal Code the same year section 1203.06 was amended. Thus, he argues the Legislature viewed these sections as parallel provisions,

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[3] *Wims* was limited on another ground in *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.

and the definition of the word "use" in section 12022, subdivision (b)(1) should be imported from section 1203.06, subdivision (b)(2).

We are not persuaded. Although the *Wims* court did use the word "someone" in discussing section 12022, subdivision (b), the crime in that case involved a human victim. (*Wims*, *supra*, 10 Cal.4th at p. 299.) *Wims* did not address the issue presented in this appeal. Appellant's argument for importing the definition of the word "use" from section 1203.06, subdivision (b)(2) is contrary to the plain meaning of section 12022, subdivision (b)(1). "In construing a statute, our role is to ascertain the Legislature's intent so as to effectuate the purpose of the law. [Citation.] In determining intent, we must look first to the words of the statute because they are the most reliable indicator of legislative intent. [Citation.] If the statutory language is clear and unambiguous, the plain meaning of the statute governs. [Citation.]" (*People v. Lopez* (2003) 31 Cal.4th 1051, 1056.)

The language of section 12022, subdivision (b)(1) prohibits the use of a deadly or dangerous weapon "in the commission of *a felony* or attempted felony," and states that an additional and consecutive one year term *shall* be imposed for its violation. (Italics added.) The statute is subject to a single exception: where use of the deadly or dangerous weapon is an element of the underlying offense. Cruelty to an animal, in violation of section 597, subdivision (a), is a felony. (§ 17.) And as we shall discuss, use of a deadly or dangerous weapon is not an element of that offense. Thus, the plain meaning of section 12022, subdivision (b)(1) supports imposition of a deadly weapon use enhancement based on a violation of section 597, subdivision (a). (See *People v. Dyer* (2002) 95 Cal.App.4th 448, 454-455 [a violation of section 597, subdivision (a) is a crime of "'force or violence'" and may be the basis for finding a defendant a mentally disordered offender since the statutory language is clear and does not except crimes of force or violence against animals].) If we were to follow appellant's interpretation, we would be required to insert the words "'against a person'" into the statute. (See *id.* at p. 454.) We have no authority to "'rewrite the statute to conform to an assumed intention

which does not appear from its language.'" (*People v. Harris* (2006) 145 Cal.App.4th 1456, 1465.)

Appellant also argues that use of a deadly weapon is an element of section 597, subdivision (a) as charged. Section 597, subdivision (a) states: "Except as provided in subdivision (c) of this section or Section 599c, every person who maliciously and intentionally maims, mutilates, tortures, or wounds a living animal, or maliciously and intentionally kills an animal, is guilty of an offense. . . ." The amended information charged appellant with "unlawfully, maliciously and intentionally stabb[ing] [a] dog to death to spite [his] girlfriend."

"The phrase 'element of the offense' signifies an essential component of the legal definition of the crime, *considered in the abstract*." (*People v. Hansen* (1994) 9 Cal.4th 300, 317.) Considered in the abstract, use of a deadly or dangerous weapon is not an element of section 597, subdivision (a). Specifically, appellant was charged with inflicting cruelty on Raven by maliciously and intentionally killing her. Although appellant committed the crime by using a knife, the crime obviously can be committed without a deadly or dangerous weapon, or any weapon at all. An example is the malicious and intentional withholding of food and water until the animal dies. Section 12022, subdivision (b)(1) applies unless use of a deadly or dangerous weapon is an element of the offense, "and not merely the means by which the offense was committed or the factual predicate of a theory upon which the conviction was based." (*Hansen*, at p. 317.)

Appellant relies on *People v. McGee* (1993) 15 Cal.App.4th 107, 115 (*McGee*), where the court states that "in determining whether use of a deadly weapon other than a firearm is an element of a section 245, subdivision (a)(1) conviction, the question is not simply whether, in the abstract, the section can be violated without using such a weapon. Rather, the conduct of the accused, i.e., the means by which he or she violated the statute, must be considered." A similar argument was considered and rejected in *People v. Ross* (1994) 28 Cal.App.4th 1151. In that case, the court stated that "the quoted language from

McGee must be limited to the peculiar situation of a statute (§ 245, subd. (a)(1)) which can be violated in two specified ways, 'by assaulting a person with a deadly weapon other than a firearm *or* by means of force likely to produce great bodily injury.' [Citation.] [¶] Whereas the statute in *McGee* had two alternative forms, as to one of which weapons use *was* an element, in contrast this case presents no such problem." (*Id.* at p. 1156, fn. 7.) The definition of animal cruelty in section 597, subdivision (a) does not include, as an element of the offense, the use of a deadly or dangerous weapon. As *McGee* observes, "[t]he fact the accused used a knife . . . did not and could not transform his use of the knife into an essential element of the crime." (*McGee, supra*, at p. 114.)

Further, the court in *McGee* was concerned that a prosecutor could attempt "to evade the statute's exception and to increase the punishment imposed on defendant simply by deleting the assault with a deadly weapon allegation and by calling the charged offense assault by means of force likely to produce great bodily injury." (*McGee*, *supra*, 15 Cal.App.4th at p. 116-117.) If so, "similarly situated defendants who assaulted their victims with deadly weapons . . . and were charged with violating section 245, subdivision (a)(1) could receive disparate punishment depending solely upon the language used in the pleadings. The one accused of assault with a deadly weapon would not be subject to the enhancement under section 12022, subdivision (b) while the one accused of assault by means of force likely to cause great bodily injury would be subject to the additional punishment." (*Id.* at p. 117.) That problem is not presented here.

II

Appellant argues that the prosecution violated section 1054.1, subdivision (b), a reciprocal discovery rule, because it "did not properly disclose unrecorded statements appellant made to Deputy Harbeson during the many phone calls on the night of the incident." On the night Raven was killed, Harbeson and Officer Aaron Jacob arrived at Bell's house in response to her 911 call. While there, Harbeson answered several of appellant's phone calls. Afterwards, Jacob prepared a written report regarding the

incident. In that report, Jacob failed to mention that appellant had asked Harbeson whether he could be arrested for killing his own dog. The report also left out appellant's statement to Harbeson in which he did not deny killing Raven.

Two or three days before Harbeson was scheduled to testify at appellant's trial, Harbeson reviewed Jacob's report. He realized that the report did not contain some of the statements appellant had made to him. On the afternoon of the day before he was to testify, Harbeson notified the prosecutor of this omission. Because appellant's counsel already had left for the day, and the prosecutor did not have his phone number, she was unable to tell appellant's attorney until the following day. Appellant requested that the court censure the prosecutor for the late disclosure. The court told appellant that he could cross-examine Harbeson and stated, "we can talk about this later." Later, appellant requested that the court give CALCRIM No. 306,[4] a jury instruction on untimely disclosure of evidence. The court denied his request, finding that the disclosure was not untimely, but "very close."

Section 1054.1 states: "The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: [¶] . . . [¶] (b) Statements of all defendants."

Appellant argues that because the prosecutor violated this reciprocal discovery provision, the court should have excluded Harbeson's testimony regarding appellant's

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[4] CALCRIM No. 306 reads: "Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. [¶] An attorney for the (People/defense) failed to disclose: _____ <*describe evidence that was not disclosed*> [within the legal time period]. [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure. [¶] [However, the fact that the defendant's attorney failed to disclose evidence [within the legal time period] is not evidence that the defendant committed a crime.]"

statements that were not contained in the police report.[5] In the alternative, he argues that the prosecution should have been sanctioned by giving CALCRIM No. 306. A trial court's ruling on discovery matters is reviewed for abuse of discretion. (*People v. Lamb* (2006) 136 Cal.App.4th 575, 581.)

The court found that the prosecutor's disclosure was not untimely: "Now, with respect to your request for [an] untimely disclosure of evidence [instruction]. It appears -- to make your argument though, it appears to the court that the timing involves and the knowledge of the deputy district attorney was *very close disclosure*, even though it is true that the witness indicated that he learned of it either two or three days before . . . you, defense was told about it . . . . It was represented to the court by the deputy district attorney who appears to be a credible person, and certainly, as an officer of the court, the court accepted that she learned of it the day before and failed to tell the defense that day exactly. But [the] defense was informed of it later. [¶] So the court is going to refuse that particular instruction." (Italics added.)

We conclude the court did not abuse its discretion by declining to give CALCRIM No. 306, a jury instruction on *untimely* disclosure of evidence. Exclusion of evidence is "not an appropriate remedy absent a showing of significant prejudice and willful conduct motivated by a desire to obtain a tactical advantage at trial." (*People v. Jordan* (2003) 108 Cal.App.4th 349, 358.) That was not shown here, and the court was within its discretion to admit the statements.

In any event, any error was harmless. Even if the appellant's statement regarding whether he could be arrested for killing his own dog and his statement refusing to deny killing Raven were excluded, or if the jurors had been instructed that they could consider

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[5] Section 1054.5, subdivision (b) states: "Upon a showing that a party has not complied with Section 1054.1 or 1054.3 . . . a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to . . . prohibiting the testimony of a witness . . . . Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure."

the effect of the "late" disclosure, there is abundant other evidence of guilt. Appellant previously had threatened to kill Raven. After Bell ended the relationship, appellant told her that bad things were going to start happening to her, and that he was going to cause her pain. He knew Bell loved Raven. After hearing appellant's voice coming from her backyard, Bell heard Raven "screeching" and then saw her bleeding. When Bell asked appellant why he had killed her dog, he told her that this was only the beginning of the bad things that were going to happen to her.

Also, the jury was aware that appellant's statements were not in the police report and that the statements were not immediately provided to the defense because appellant's attorney thoroughly cross-examined Harbeson regarding the matter. His attorney also reiterated to the jury during closing argument that the statements were missing from the police report. Finally, the jury was given CALCRIM No. 358, which states: "You have heard evidence that the defendant made [oral statements before the trial]. . . . [¶] [*You must consider with caution evidence of a defendant's oral statement unless it was written or otherwise recorded.*]" (Italics added.)

It is not reasonably probable that appellant would have received a more favorable result absent the alleged errors. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)

III

We reject appellant's argument that cumulative prejudice exists as we have not found any errors, and in the "instances where we have assumed error for purposes of discussion . . . we have not found prejudice or, indeed, any significant adverse impact." (*People v. Holloway* (2004) 33 Cal.4th 96, 142.)

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.